

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA,

Plaintiff,

STATE OF NEW HAMPSHIRE,

Plaintiff-Intervenor,

v.

CITY OF NASHUA, NEW HAMPSHIRE,

Defendant.

CIVIL ACTION NO.

CONSENT DECREE

WHEREAS, the City of Nashua, New Hampshire (the "City" or "Nashua"), discharges pollutants into navigable waters of the United States from its publicly-owned treatment works ("POTW") and Combined Sewer Overflows ("CSOs") pursuant to National Pollutant Discharge Elimination System ("NPDES") Permit No. NH0100170 (the "Permit");

WHEREAS, the plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), has filed a complaint simultaneously herewith, alleging that the City has violated the Permit and Section 301(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a);

WHEREAS, the State of New Hampshire, on behalf of the New Hampshire Department of Environmental Services ("NHDES"), has filed an assented-to motion to intervene as a plaintiff in the action brought by the United States and has filed a complaint alleging that the City was, and is, in ongoing violation of Section 301 of the CWA, 33 U.S.C. § 1311, the New

Hampshire Water Pollution and Waste Disposal Act, N.H. RSA 485-A (“New Hampshire Act”), and provisions of the Permit and State Permit No. NH0100170 issued by the NHDES under the New Hampshire Act (said Federal and State permits having been jointly issued as a single permit);

WHEREAS, entry of this Consent Decree by the Court will resolve all claims in the Complaint of the United States and the Complaint of the State, referred to herein collectively as the “Complaints”; and

WHEREAS, the United States, the State, and the City (collectively “Parties”) agree, without admission of facts or law except as expressly stated herein, that settlement of this matter is in the public interest and that entry of this Consent Decree without further litigation is an appropriate resolution of the dispute, and the Parties consent to the entry of this Consent Decree.

NOW, THEREFORE, it is hereby ordered, adjudged, and decreed as follows:

#### I. STATEMENT OF CLAIM

1. The Complaints state claims upon which relief can be granted against the City pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, and pursuant to Section 12 of the New Hampshire Act, N.H. RSA 485-A:12.

#### II. JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of the claims in the United States’ Complaint pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1331, 1345, and 1355, and of the claims in the State’s Complaint under the doctrine of pendent jurisdiction. This Court has personal jurisdiction over the Parties to this Consent Decree. Venue properly lies in this district pursuant to Section 309(b) of the CWA, 33 U.S.C.

§ 1319(b), 28 U.S.C. §§ 1391(b) and (c), and 28 U.S.C. § 1395. The City waives all objections it might have raised to such jurisdiction or venue.

### III. APPLICABILITY

3. The provisions of this Consent Decree shall apply to, and be binding upon, the City and its officers, directors, agents, employees acting in their official capacities, its successors, and assigns. The City shall provide a copy of this Consent Decree to all contractors and consultants retained to perform any obligation required by this Consent Decree on behalf of the City, and shall require that contractors and consultants provide a copy of this Consent Decree to their subcontractors. The City shall condition any such contract upon performance of the work in conformity with the terms of this Consent Decree.

### IV. DEFINITIONS

4. Unless otherwise expressly provided herein, terms used in this Consent Decree, which are defined in the CWA or in regulations promulgated under the CWA, shall have the meaning ascribed to them in the CWA or in the regulations promulgated thereunder. Whenever the terms listed below are used in this Consent Decree, the following definitions shall apply:

A. "Collection System" shall mean the wastewater collection, storage and transmission system owned or operated by the City, including, but not limited to, all devices, minisystems, pump stations, force mains, gravity sewer lines, manholes, and appurtenances.

B. "Consent Decree" shall mean this decree and all appendices attached hereto. In the event of conflict between this decree and any appendix, this decree shall control.

C. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or Federal or State of New Hampshire holiday, the period shall run until the close of business of the next working day.

D. "Excessive Infiltration/Inflow" shall mean the quantities of Infiltration/Inflow which can be economically eliminated from a sewer system as determined in a cost-effectiveness analysis that compares the costs for correcting the Infiltration/Inflow conditions to the total costs for transportation and treatment of the Infiltration/Inflow.

E. "Flow" shall mean all wastewaters conveyed by any portion of the Collection System.

F. "Infiltration" shall mean the water that enters the Collection System (including sewer service connections) from the ground through such means as defective pipes, pipe joints, connections or manholes. Infiltration does not include, and is distinguished from, inflow.

G. "Inflow" shall mean all water that enters the Collection System (including sewer service connections) from sources such as roof leaders, cellar drains, yard drains, area drains, foundation drains, drains from springs and swampy areas, manhole covers, cross connections between storm sewers and sanitary sewers, catch basins, storm waters, surface runoff, street wash waters, or drainage. Inflow does not include, and is distinguished from, infiltration.

H. "Infiltration/Inflow" shall mean the total quantity of water from both infiltration and inflow without distinguishing the source.

I. The phrases “approval by the EPA and the NHDES” and “approved by the EPA and the NHDES” shall mean the City’s receipt of one joint, written approval document from both, or an approval from each, EPA and NHDES.

J. “CSO-related treatment plant bypass” shall have the same meaning as used in EPA’s Combined Sewer Overflow Control Policy, published at 59 Fed. Reg. 18688 (April 19, 1994).

K. “Sanitary Sewer Overflow” (SSO) is an overflow, spill, release, or diversion of wastewater from any portion of the collection system other than the City’s combined sewer system, and includes any discharges to waters of the State or United States through point sources not specified in any NPDES permit, as well as any release of wastewater (from any portion of the collection system other than the City’s combined sewer system) that does not reach waters of the United States or the State.

L. “Combined Sewer System” shall mean the pipelines, conduits, pumping stations, force mains, and all other structures, devices, appurtenances, and facilities used for collecting and conveying sanitary wastewaters (domestic, commercial and industrial wastewaters) and storm water through a single pipe system to CSO outfalls and/or the POTW Treatment Plant.

#### V. OBJECTIVES

5. It is the express purpose of the Parties in executing this Consent Decree to require the City to perform all measures necessary to achieve and maintain compliance with the CWA, the New Hampshire Act, its Permit, and any applicable state and federal regulations.

6. Engineering designs and analyses required to be performed pursuant to this Consent Decree shall be conducted using sound engineering practices and, as applicable, shall be consistent with (a) EPA's Handbook: Sewer System Infrastructure Analysis and Rehabilitation, EPA/625/6-91/030, Oct. 1991; (b) EPA's Handbook for Sewer System Evaluation and Rehabilitation, EPA 430/9-75-021, Dec. 1975; and (c) the currently effective edition of "TR 16: Guides for the Design of Wastewater Treatment Works."

## VI. REMEDIAL MEASURES

### CSO MITIGATION

7. The City shall construct CSO controls identified in the January 2003 Report on Baseline Conditions Update and Development and Evaluation of Alternatives to the City's Current CSO Control Plan, as amended June 4, 2003, prepared for the City by Metcalf & Eddy (the "2003 LTCP"). In accordance with the 2003 LTCP, the City shall achieve the milestones set forth in the following table:

<b>Date</b>	<b>Scheduled CSO Project</b>
2/1/06	Begin design of CSO 005/006 screening/disinfection facility
6/1/06	Install and operate South Main Street/Main Street SW outfall/SW detention ponds
6/25/06	Complete separation of Ledge Street subarea
7/31/06	Begin construction of a NWTF wet weather bypass and treatment facility
8/1/07	Begin design of system optimization/infrastructure improvements
2/1/08	Begin construction of CSO 005/006 screening/disinfection facility
8/1/08	Begin construction of system optimization/infrastructure improvements
1/31/09	Complete construction and begin operation of the NWTF wet weather bypass and treatment facility

8/1/09	Begin design of CSO 003 and CSO 004 Storage facilities
2/1/10	Complete construction of system optimization/infrastructure improvements
2/1/11	CSO 005/006 Complete construction of Screening/Disinfection Facility
2/1/11	Begin construction of CSO 003 and CSO 004 Storage facilities
8/1/12	Complete construction of CSO 003 and CSO 004 Storage facilities

8. Within five years following lodging of this Consent Decree, the City shall submit to EPA and NHDES for approval a post-construction monitoring plan ("PCMP"). The PCMP shall include a monitoring protocol to assess the effectiveness of the CSO controls constructed pursuant to this Consent Decree as to capturing and treating storm water and protecting receiving waters from CSO impacts. The PCMP shall include a schedule for (a) assessing the impacts of varying precipitation amounts on effluent characteristics and ambient water quality, and (b) submitting a monitoring report ("Post-Construction Monitoring Report"). The Post-Construction Monitoring Report shall identify the expected frequency of CSOs remaining after full implementation of the 2003 LTCP, characterize their impacts, and identify a full range of alternatives for eliminating the environmental impacts from any remaining CSOs.

9. The EPA and the NHDES may propose that additional CSO mitigation projects be incorporated into Section VI of this Consent Decree if, after receipt of the Post-Construction Monitoring Report under Paragraph 8 of this Consent Decree, the EPA and the NHDES determine that additional controls are necessary to achieve compliance with water quality standards. The Court may, upon motion, incorporate a schedule for additional CSO controls into this Consent Decree over the objection of the City after an opportunity for hearing.

### HIGH FLOW MANAGEMENT

10. By September 1, 2005, the City shall submit to EPA and NHDES for approval a high flow management plan ("HFMP"). The HFMP shall include: (a) facility management procedures that provide the highest level of BOD, TSS, and bacteria removal feasible while maximizing pollutant removal, disinfection, and de-chlorination for flows that may bypass a portion of the treatment plant; (b) a proposal for interim limits on effluent receiving secondary treatment during bypass events; and © a monitoring protocol that demonstrates the effectiveness of wet weather treatment operations by monitoring (i) effluent receiving secondary treatment, (ii) wastewater bypassed around secondary treatment, and (iii) the combined effluent. Upon receiving written approval of the HFMP from EPA and NHDES, the City shall operate in accordance with the HFMP.

### EXCESSIVE INFILTRATION/INFLOW

11. The City shall submit to EPA and NHDES for approval by February 28, 2006, a report ("I/I Report") that identifies sources of Excessive Infiltration/Inflow to the Collection System. The I/I Report shall quantify both groundwater and rainfall-induced infiltration and the inflow components of flow during periods of high groundwater.

12. The I/I Report shall include, but shall not be limited to, the following:

a. A street map of the Collection System delineating all subsystems, the location of all manholes where the City conducted flow monitoring during the investigation, all major branch, trunk, and interceptor sewers, pump stations, force mains, overflow points, and the treatment plant. The map(s) must differentiate force mains from gravity sewers and indicate the



size of all interceptor sewers. The boundaries of each subsystem being investigated must be clearly indicated, to the extent possible;

b. An evaluation of the ability of separate portions of the Collection System to convey expected flows to the treatment plant;

c. A cost-effectiveness analysis undertaken to determine which subsystems contain Excessive Infiltration/Inflow, and a narrative description of the bases for the analysis;

d. A list of all public and private sources of inflow and infiltration identifying those that were determined to be sources of Excessive Infiltration/Inflow;

e. Proposals for rehabilitating or replacing each structurally deficient component of the Collection System, and a schedule for implementing the recommended rehabilitation/replacement measures as soon as practicable, but within seven years of the date of lodging of this Consent Decree, including engineering design and construction;

f. Proposals and a schedule for providing, as soon as practicable but within seven years of the date of lodging of this Consent Decree, the capacity in separated portions of the Collection System necessary to convey wastewater to the treatment plant for all areas in which rehabilitation is not cost effective and where the existing separated portions of the Collection System do not have sufficient capacity to convey such flow to the treatment plant; and

g. With regard to proposals for addressing private sources of Excessive Infiltration/Inflow, an evaluation of whether any changes in the City's by-laws or regulations are necessary to implement such proposals.

13. Upon approval by NHDES and EPA, the proposals and schedules under Paragraphs 12.e. and 12.f. shall become enforceable requirements of this Consent Decree. In the event the parties cannot agree on appropriate proposals and schedules, any party may invoke the dispute resolution procedures in Part XI below; provided, however, that the relief granted shall be consistent with Part V of this Consent Decree (“Objectives”) and shall provide for the elimination of Excessive Infiltration/Inflow.

#### LONG-TERM PREVENTATIVE MAINTENANCE PROGRAM

14. Within 365 days of the lodging of this Consent Decree, the City shall submit to EPA and NHDES for approval a plan for a Long-Term Preventative Maintenance Program (“the Preventative Maintenance Program”). The Preventative Maintenance Program shall include, but need not be limited to, the following:

a. physical inspection and testing procedures to be used to routinely inspect and maintain the City’s Collection System including, but not limited to, all pump stations, force mains, emergency generators, alarms, telemetry equipment, interceptor and lateral sewers, and to be used to identify and correct any structural, mechanical, or operational problems that may result in SSOs;

b. preventative and routine maintenance schedules and procedures, including, but not limited to, specific maintenance plans for those areas of the Collection System prone to mechanical failures, grease and silt deposits and root penetration, as well as those areas that have been the source of SSOs in the past;

c. a tracking system for all maintenance activities, including, at a minimum, the purchase and use of sewer system maintenance software designed to catalog the maintenance

history of the Collection System and to plan and schedule future Collection System maintenance activities;

d. staffing, organization, and resource commitments;

e. a plan for routine maintenance cleaning of the Collection System to maintain the Collection System's capacity and to prevent Collection System blockages and SSOs;

f. a proposed budget for implementation of the Preventative Maintenance Plan; and

g. an implementation schedule.

15. The City shall immediately and continuously implement the Preventative Maintenance Plan upon approval or conditional approval by EPA and NHDES.

#### VII. INTERIM PERMIT CONDITIONS

16. The average weekly and monthly concentration and mass of BOD, TSS and Settleable Solids in the City's effluent for days when CSO-related treatment plant bypass events do not occur shall not exceed the average weekly and average monthly limits for those parameters in the Permit and all Future Permits issued to the City.

17. Wastewater not receiving secondary treatment must not contain a daily E. coli bacteria concentration of more than 406 colonies per 100 milliliters or a daily Total Residual Chlorine concentration greater than 0.532 mg/l.

#### VIII. REPORTS ON COMPLIANCE

18. Beginning on the first day of the calendar quarter following entry of the decree, and until completion of construction of all the Remedial Measures in Section VI, the City shall

report to EPA and NHDES on its compliance with Section VI every three months. Each progress report submitted under this paragraph shall:

- a. Describe activities undertaken during the reporting period directed at achieving compliance with this Consent Decree;
- b. Describe the expected activities to be taken during the next reporting period in order to achieve compliance with this Consent Decree; and
- c. Identify any noncompliance with this Consent Decree's requirements, including the schedule set forth in the 2003 LTCP. If noncompliance is reported, notification should include the following information:
  - (i) A description of the noncompliance;
  - (ii) A description of any actions taken or proposed by the City to comply with any elapsed schedule requirements;
  - (iii) A description of any factors which tend to explain or mitigate the noncompliance; and
  - (iv) An approximate date by which the City will perform the required action.

The reporting requirements set forth in this Section do not relieve the City of its obligation to submit any other reports or information as required by state, federal or local law.

19. Within five days of learning that it will fail, or has failed, to comply with a requirement of this Consent Decree, the City shall provide written notice of such failure to the NHDES and the EPA in accordance with paragraph 45, below.

## IX. STIPULATED PENALTIES

20. The City shall pay stipulated penalties to the United States and the State of New Hampshire for violations of this Consent Decree, as set forth below:

a. Two Hundred Fifty Dollars (\$250) per violation per day for each day the City is late in submitting a report required by Paragraphs 18 or 19 of this Consent Decree or fails to provide the certification required by Paragraph 46 of this Consent Decree;

b. For every day that the City is late in meeting the requirements of Section VI (Remedial Measures), including, but not limited to, submitting an approvable plan or report, or fails to implement remedial requirements in a plan or report approved by EPA and/or NHDES, as appropriate, the City shall pay a penalty as follows:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 250	1 <sup>st</sup> through 10 <sup>th</sup> day
\$ 500	11 <sup>th</sup> through 20 <sup>th</sup> day
\$1,000	21 <sup>st</sup> day and beyond;

c. For each day that the City fails to comply with Paragraphs 16 or 17 of this Consent Decree or the interim limits under Paragraph 10 of this Consent Decree, it shall pay a penalty of One Thousand Dollars (\$1,000); and

d. For each and every day, or a portion thereof, of a SSO from the Collection System, the City shall pay a stipulated penalty of Five Thousand Dollars (\$5,000). Notwithstanding the foregoing, the City shall not be liable for such a stipulated penalty if all of the following conditions are met: (i) the City stopped the SSO as soon as practicable; (ii) the City is in full compliance with the schedules and requirements set forth pursuant to Section VI of this

Consent Decree; and (iii) the City has complied with all reporting requirements related to such SSO, including those set forth in this Consent Decree.

21. Penalties shall continue to accrue as provided in accordance with Paragraph 20 during any dispute resolution, with interest on accrued penalties, payable and calculated at the rate established by the Secretary of the Treasury, pursuant to 28 U.S.C. § 1961, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to the Court, accrued penalties determined to be owing, together with accrued interest, shall be paid to the United States within 30 days of the effective date of the agreement or the receipt of EPA's decision or order;

b. If the dispute is appealed to the Court and the United States prevails in whole or in part, Defendant shall, within 60 days of receipt of the Court's decision or order, pay all accrued penalties determined by the Court to be owing, together with accrued interest, except as provided in Subparagraph c, below; and

c. If the District Court's decision is appealed by any Party, Defendant shall, within 15 days of receipt of the final appellate court decision, pay all accrued penalties determined to be owing to the United States, together with accrued interest.

22. Stipulated penalty payments as specified in this Section shall be made by delivering such payments to the United States and the State of New Hampshire, in equal amounts, in accordance with the instructions set forth in this paragraph.

a. Stipulated penalty payments to the United States shall be made, upon written demand, by certified check payable to "Treasurer, United States of America" and shall be

delivered by certified mail to the *Department of Justice*, with notice to EPA, at the addresses listed in Section XIV (Form of Notice). Payments shall be made within seven days of receipt of written demand;

b. Stipulated penalty payments to the State shall be made, upon written demand, by certified or cashier's check payable to the "Treasurer, State of New Hampshire" and shall be delivered to the Department of Justice, Environmental Protection Bureau, 33 Capitol Street, Concord, New Hampshire, 03301, Attn: Jennifer J. Patterson, Esq. Payments shall be accompanied by a reference to this Consent Decree. Payments shall be made within seven days of receipt of written demand; and

c. In the event that a stipulated penalty payment is not made on time to the United States or the State, such penalty (or portion thereof) shall be subject to interest at the statutory judgment rate set forth at 28 U.S.C. § 1961, for each day of late payment or non-payment. Nothing in this paragraph shall be construed to limit the United States or the State from seeking any remedy otherwise provided by law for failure of the City to pay any stipulated penalties.

23. The stipulated penalties set forth above shall be in addition to any other remedies, sanctions, or penalties which may be available by reason of the City's failure to comply with the requirements of this Consent Decree. The United States and State expressly reserve any and all legal and equitable remedies, including contempt sanctions, which may be available to enforce the provisions of this Consent Decree.

24. The United States or the State of New Hampshire may, in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due to that sovereign under this Consent Decree.

25. Either the United States or the State, or both, may elect to seek stipulated penalties under this Section. Where both sovereigns elect to seek stipulated penalties for any violation of this Consent Decree, any such penalties determined to be owing shall be paid fifty percent to the United States and fifty percent to the State. Where one sovereign elects to seek such stipulated penalties, and the other sovereign does not join in the demand within fifteen days of its receipt, timely joins in the demand as to only some of the violations in question, or timely joins in the demand but subsequently elects to waive stipulated penalties as to any or all of the violations in question, the entire amount of the stipulated penalties determined to be owing for each violation as to which only one sovereign has sought stipulated penalties shall be payable to the sovereign making the demand. Where one sovereign reduces the stipulated penalty otherwise payable for any violation, the difference shall be payable to the other sovereign. In no case shall the determination by one sovereign not to seek stipulated penalties preclude the other sovereign from seeking stipulated penalties, as otherwise provided for by, and consistent with, the terms of this Consent Decree.

#### X. FORCE MAJEURE

26. “Force Majeure,” for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of the City, including its contractors and subcontractors, that delays or prevents the timely performance of any obligation under this Consent Decree notwithstanding the City’s best efforts to avoid the delay. “Best efforts” include anticipating any



potential Force Majeure event and addressing the effects of any such event (a) as it is occurring, and, (b) after it has occurred, to prevent or minimize any resulting delay to the greatest extent possible. Stipulated penalties shall not be due for those days of noncompliance caused by a Force Majeure event as defined in this Section in which compliance could not be achieved despite the "best efforts" of the City, provided that the City complies with the terms of this Section. Examples of events that are **not** Force Majeure events include, but are not limited to, normal inclement weather, unanticipated or increased costs or expenses of work, the financial difficulty of the City to perform such work, acts or omissions attributable to the City's contractors or representatives, and the failure of the City or the City's contractors or representatives to make complete and timely application of any required approval or permit.

27. If any event occurs which may delay or prevent the performance of any obligation under this Consent Decree, whether or not caused by a Force Majeure event, the City shall notify EPA and NHDES within 72 hours after the City first knew, or should have known, that the event might cause a delay. Within five working days thereafter, the City shall provide to EPA and NHDES, at the addresses specified in Section XIV (Form of Notice), a written explanation of the cause(s) of any actual or expected delay or noncompliance, the anticipated duration of any delay, the measure(s) taken and to be taken by the City to prevent or minimize the delay, a proposed schedule for the implementation of such measures, and a statement as to whether, in the opinion of the City, such event may cause or contribute to an endangerment to public health, welfare, or the environment. Notwithstanding the foregoing, the City shall notify EPA and NHDES orally within 24 hours of becoming aware of any event which presents an

imminent threat to the public health or welfare or the environment and provide written notice to EPA and NHDES within 72 hours.

28. If EPA and NHDES agree that a delay or anticipated delay is attributable to Force Majeure, the time for performance of the obligations under this Consent Decree that are affected by the Force Majeure event shall be extended by mutual agreement of the Parties for a period of time as may be necessary to allow prompt performance of such obligations.

29. If the Parties are unable to agree as to whether a delay or anticipated delay is attributable to Force Majeure, or on the number of days of noncompliance that should be excused by such event, the City may initiate the dispute resolution process set forth in Section XI (Dispute Resolution). If the City does not initiate the dispute resolution process set forth in Section XI within ten days of receiving written notice that EPA and NHDES disagree as to whether a delay or anticipated delay is attributable to Force Majeure, or on the number of days of noncompliance attributable to such circumstances, then the City shall be deemed to have waived any Force Majeure claims or any rights to initiate Dispute Resolution with regard to such claims.

30. Delay in performance of any obligation under this Consent Decree shall not automatically justify or excuse delay in complying with any subsequent obligation or requirement of this Consent Decree.

31. Failure of the City to obtain any state or federal grants or loans shall not be considered a Force Majeure event under this Consent Decree.

#### XI. DISPUTE RESOLUTION

32. The dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under, or with respect to, this Consent Decree. However,

the procedures set forth in this Section shall not apply to actions by the United States or the State to enforce obligations that the City has not disputed in accordance with this Section.

33. If the City objects to disapproval or conditions in an approval of any item required to be submitted to EPA and NHDES under this Consent Decree, or if the Parties are unable to agree as to whether a delay or anticipated delay is attributable to Force Majeure or the number of days of noncompliance caused by such event, or on the amount of Stipulated Penalties due, the City may initiate informal, good faith negotiations among the Parties to the dispute for a period of up to 30 days from the time the City gives notice of the existence of the dispute, provided that the City gives EPA and NHDES notice of the existence of the dispute within 15 days after receipt of a notice of disapproval or conditional approval, or a Force Majeure or Stipulated Penalty determination by EPA and/or NHDES, as appropriate. The period for negotiations may be extended by agreement of the Parties.

34. In the event that the Parties cannot resolve any such dispute by informal negotiations under the preceding paragraph, then the position advanced by EPA and NHDES shall be considered binding unless, within 30 days of the end of the negotiation period, the City shall file a petition with this Court setting forth the matter in dispute, the efforts of the Parties to resolve it, and the relief requested. EPA and/or NHDES, as appropriate, shall then have 30 days to respond to any such petition.

35. In proceedings on any dispute regarding a delay in performance as set forth in this Section, the City shall have the burden of proving: (a) that the delay or noncompliance is, or was, caused by a Force Majeure event, and (b) the amount of additional time requested is necessary to compensate for that event. In no event shall the time for performance be extended

for a period longer than the actual delay resulting from the Force Majeure event and the City's obligation to use its "best efforts" to minimize the delay resulting from the Force Majeure event.

36. Notwithstanding the previous paragraph, in all disputes under this Section, the City shall have the burden of proving that the position of the United States and the State is arbitrary and capricious. EPA shall maintain an administrative record of the dispute, which shall contain all statements of the Parties, including supporting documentation, submitted pursuant to this Section.

## XII. APPROVAL OF DELIVERABLES

37. After review of any plan, report, or other item that is required to be submitted pursuant to this Consent Decree, EPA and NHDES, shall in writing: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; or © disapprove, in whole or in part, the submission.

38. Upon approval pursuant to Paragraph 37(a), the City shall take all actions required by the plan, report, or other item, as approved by EPA and NHDES. In the event of approval in part pursuant to Paragraph 37(a) or approval upon specified conditions pursuant to Paragraph 37(b), upon written direction of EPA and NHDES, the City shall take all actions required by the approved plan, report, or other item, that EPA and NHDES determine are technically severable from any disapproved portions, subject to the City's right to dispute only the specified conditions or the non-approved portions pursuant to Paragraphs 32 through 36.

39. Upon receipt of a written notice of approval in part pursuant to Paragraph 37(a) or of disapproval pursuant to Paragraph 37©, the City shall, within 45 days or such other time as the Parties agree in writing, correct deficiencies and resubmit the plan, report, or other item, or

portion thereof, for approval. Any stipulated penalties applicable to the submission, including, but not limited to, those in Paragraph 20(b), shall accrue during the 45-day period or specified period but shall not be payable unless the resubmission is untimely and/or disapproved as provided in Paragraph 37.

40. In the event that a resubmitted plan, report or other item, or portion thereof, is disapproved by EPA and NHDES, EPA and NHDES may again require the City to correct the deficiencies, in accordance with the preceding paragraphs.

41. If upon resubmission, a plan, report, or item, or portion thereof, is disapproved by EPA and NHDES, the City shall be deemed to have failed to submit such plan, report, or item, or portion thereof, unless the City invokes the dispute resolution procedures set forth in Paragraphs 32 through 36 within 15 days of receipt of EPA's and NHDES's written position. If EPA's and NHDES's disapproval is upheld after dispute resolution, stipulated penalties shall accrue for such violation from the date of the disapproval of the original submission.

42. All plans, reports, and other items required to be submitted to EPA and NHDES under this Consent Decree shall, upon approval by EPA and NHDES, be enforceable under this Consent Decree. In the event EPA and NHDES approve a portion of a plan, report, or other item required to be submitted under this Consent Decree, the approved portion shall be enforceable under this Consent Decree.

43. In the event a dispute arises among the Parties regarding EPA's and NHDES's approval upon specified conditions or disapproval in part or in whole of any plans, reports, and other items required to be submitted to EPA and NHDES under this Consent Decree, the position of the EPA and the NHDES shall govern unless the City invokes the dispute resolution process

set forth in Paragraphs 32 through 36 within 15 days of receipt of EPA's and NHDES's written position.

### XIII. RIGHT OF ENTRY

44. EPA and NHDES and their contractors, consultants, and attorneys shall have authority to enter any property and/or facility covered by this Consent Decree at all reasonable times, upon proper identification, for the purposes of monitoring the progress of activity required by this Consent Decree, verifying any data or information submitted to EPA and NHDES under this Consent Decree, and assessing the City's compliance with this Consent Decree. Upon request, the City of Nashua will be provided with splits of all samples taken by the EPA or the NHDES in connection with this Consent Decree. This requirement is in addition to, and does not limit, the authority of EPA or NHDES pursuant to the CWA, the New Hampshire Act, or any other provision of state or federal law.

### XIV. FORM OF NOTICE

45. Submissions required by this Consent Decree shall be made in writing by certified mail with return receipt, or by any reliable commercial delivery service that provides written verification of delivery to the following respective addressees, unless written notice is given that another individual has been designated to receive the submissions. Any submission required by this Consent Decree must be received by EPA and/or NHDES, as appropriate, no later than the date due stated in the Consent Decree.

As to the Department of Justice:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
United States Department of Justice  
P.O. Box 7611, Ben Franklin Station  
Washington, D.C. 20044

As to the EPA:

Michael Wagner  
Senior Enforcement Counsel  
U.S. Environmental Protection Agency  
One Congress Street, Suite 1100  
Mail Code: SEL  
Boston, MA 02114-2023

Joy Hilton  
Environmental Engineer  
U.S. Environmental Protection Agency  
One Congress Street, Suite 1100  
Mail Code: SEW  
Boston, MA 02114-2023

As to the NHDES:

George Berlandi, P.E.  
Supervisor of Permits and Compliance  
29 Hazen Drive  
P.O. Box 95  
Concord, NH 03302-0095

As to the New Hampshire Attorney General's Office:

Jennifer J. Patterson  
Senior Assistant Attorney General  
Environmental Protection Bureau  
New Hampshire Attorney General's Office  
33 Capitol Street  
Concord, New Hampshire 03301

As to the City of Nashua, New Hampshire:

Honorable Bernard A. Streeter  
Mayor  
City of Nashua  
229 Main Street  
Nashua, NH 03060

46. All written notices, reports or any other submissions required by this Consent

Decree shall contain the following certification by a duly authorized representative of the City:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

XV. EFFECT OF SETTLEMENT

47. This Consent Decree is neither a permit nor a modification of an existing permit under any federal, state, or local law and in no way relieves the City of its responsibilities to comply with all applicable federal, state, and local laws and regulations, nor shall it be construed to constitute EPA's approval of any equipment or technology installed by the City under the terms of this Consent Decree.

48. This Consent Decree does not limit any rights or remedies available to the United States or the State for any violation by the City of the CWA, the New Hampshire Act, and associated regulations or permit conditions, other than those civil violations specifically alleged in the Complaints, through the date of lodging of this Consent Decree. This Consent Decree



does not limit or effect any liability for any criminal violations or rights or remedies available to the United States or the State for criminal violations. Nor does it limit the ability of the United States to take action pursuant to Section 504 of the CWA, 33 U.S.C. § 1364, or the ability of the State to take emergency action to protect public health or the environment pursuant to any applicable New Hampshire statute or common law authority. This Consent Decree does not limit the standing of any person under Section 505 of the CWA, 33 U.S.C. § 1365, to sue for any future violation of the CWA not addressed by this Consent Decree. The United States and the State expressly reserve all rights and remedies, legal and equitable, available to each of them for all violations of the CWA, the New Hampshire Act, or other applicable law where such violations are not specifically alleged in their respective Complaints, and reserve all rights and remedies, legal and equitable, available to enforce the provisions of this Consent Decree. Nothing herein shall be construed to limit the power of the United States or the State, consistent with the respective authority of each, to undertake any action against any person, in response to conditions which may present an imminent and substantial endangerment to the public's health or welfare, or the environment.

49. Neither the United States nor the State, by consent to the entry of this Consent Decree, warrant or aver in any manner that the City's compliance with this Consent Decree will result in compliance with the CWA, the New Hampshire Act, or any regulations or permits issued thereunder.

#### XVI. COSTS

50. Each party shall bear its own costs and attorneys' fees in this action. The City

shall be responsible for all expenses incurred by the United States and/or the State in collecting any outstanding penalties due under Section IX of this Consent Decree and in enforcing the requirements of this Consent Decree, unless the City prevails before a court in any dispute resolution brought pursuant to Section XI.

#### XVII. RETENTION OF JURISDICTION

51. The Court shall retain jurisdiction to modify and enforce the terms and conditions of this Consent Decree and to resolve disputes arising hereunder as may be necessary or appropriate for the construction or execution of this Consent Decree and to assess any stipulated penalties that may have accrued because of the Defendant's failure to comply with any of its obligations under this Consent Decree.

#### XVIII. MODIFICATION

52. Any material modification to the terms of this Consent Decree shall be by written agreement of the Parties and approval of the Court; provided, however, that, without otherwise altering the obligations of the Consent Decree, (a) the parties may by written agreement modify the schedules specified in this Consent Decree; and (b) EPA and NHDES may approve modifications of submissions to EPA and NHDES, subject to the rights of the City in Part XI (Dispute Resolution). Such modifications shall become effective upon agreement of the parties or approval by the EPA and NHDES, as appropriate.

#### XIX. FUNDING

53. Performance of the terms of this Consent Decree by the City is not conditioned on the receipt of any federal or state grant funds or loans. In addition, performance is not excused by the lack of any federal or state grant funds or loans.

#### XX. SEVERABILITY PROVISION

54. The provisions of this Consent Decree shall be severable and, should any provisions be declared by a court of competent jurisdiction to be unenforceable, the remaining provisions shall remain in full force and effect.

#### XXI. TERMINATION

55. The Court shall terminate this Consent Decree upon joint motion of the Parties after the City has paid all outstanding penalties, has completed all remedial measures (including post-construction monitoring) required under Section VI of this Consent Decree, and has demonstrated compliance with its then-current NPDES permit to the satisfaction of the EPA for one year.

#### XXII. FINAL JUDGMENT

56. Entry of this Consent Decree constitutes Final Judgment under Rule 54 of the Federal Rules of Civil Procedure.

#### XXIII. WAIVER OF SERVICE OF SUMMONS AND COMPLAINT

57. The City hereby acknowledges receipt of the Complaints and waives service of the summonses pursuant to Rule 4 of the Federal Rules of Civil Procedure.

#### XXIV. PUBLIC COMMENT

58. The City consents to the entry of this Consent Decree without further notice. Final approval of this Consent Decree is subject to the public notice requirements of 28 C.F.R. § 50.7. After reviewing the public comments, if any, the United States shall advise the Court by motion whether it supports entry of the Consent Decree.

United States v. the City of Nashua, New Hampshire  
United States District Court  
District of New Hampshire  
Consent Decree

Judgment is hereby entered in accordance with the foregoing Consent Decree this

\_\_\_\_\_ day of \_\_\_\_\_, 2005.

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UNITED STATES DISTRICT JUDGE

United States v. the City of Nashua, New Hampshire  
United States District Court  
District of New Hampshire  
Consent Decree

The following parties hereby consent to the entry of this Consent Decree:

For Plaintiff UNITED STATES OF AMERICA

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Kelly A. Johnson  
Acting Assistant Attorney General  
Environment & Natural Resources Division  
United States Department of Justice

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DATE

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Peter Flynn  
Senior Attorney  
Environmental Enforcement Section  
Environment & Natural Resources Division  
United States Department of Justice  
P.O. Box 7611, Ben Franklin Station  
Washington, DC 20044

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DATE

United States v. the City of Nashua, New Hampshire  
United States District Court  
District of New Hampshire  
Consent Decree

THOMAS P. COLANTUONO  
United States Attorney  
District of New Hampshire

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T. David Plourde  
NH Bar No. 2044  
Assistant United States Attorney  
53 Pleasant Street, 4th floor  
Concord, NH 03301-3904

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DATE

United States v. the City of Nashua, New Hampshire  
United States District Court  
District of New Hampshire  
Consent Decree

For the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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Walker B. Smith, Director  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
United States Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

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DATE

United States v. the City of Nashua, New Hampshire  
United States District Court  
District of New Hampshire  
Consent Decree

For the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, continued

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Stephen S. Perkins  
Director, Office of Environmental Stewardship  
United States Environmental Protection Agency,  
Region I  
One Congress Street  
Boston, MA 02114

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DATE

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Michael Wagner  
Senior Enforcement Counsel  
U.S. Environmental Protection Agency  
One Congress Street, Suite 1100  
Mail Code: SEL  
Boston MA 02114-2023

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DATE



United States v. the City of Nashua, New Hampshire  
United States District Court  
District of New Hampshire  
Consent Decree

For Plaintiff STATE OF NEW HAMPSHIRE

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Jennifer J. Patterson  
Senior Assistant Attorney General  
Environmental Protection Bureau  
New Hampshire Attorney General's Office  
33 Capitol Street  
Concord, NH 03301

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DATE

United States v. the City of Nashua, New Hampshire  
United States District Court  
District of New Hampshire  
Consent Decree

For Defendant CITY OF NASHUA, NEW HAMPSHIRE

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Honorable Bernard A. Streeter  
Mayor  
City of Nashua  
229 Main Street  
Nashua, NH 03060

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DATE